Supreme Court, U.S.
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In The

Supreme Court of the United States

DONALD KEITH CRAWFORD, SR.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's sentence of 41 months is unconstitutional under *Blakely v. Washington*, No. 02-1632, 2004 WL 1402697 (U.S. June 24, 2004), as it was based upon facts neither charged in the indictment, nor found by a jury beyond a reasonable doubt.

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PETITION FOR WRIT OF CERTIORARI

Now Comes Petitioner DONALD KEITH CRAWFORD, SR., and pursuant to SUP.CT.R. 13.1, respectfully submits his Petition for a Writ of Certiorari.

OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States v. Donald Keith Crawford, Sr.*, No. 03-50160 (5th Cir. 2004) (unpublished), was announced on April 27, 2004, and is reproduced in the APPENDIX at App. 1-2. Petitioners appeal was from the judgment of conviction, and sentence imposed, in *United States v. Donald Keith Crawford, Sr.*, Cause No. SA-02-CR-23 and is reproduced in the APPENDIX at App. 5-13.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Fifth Circuit Court of Appeals was entered on April 27, 2004. APPENDIX at App. 1-2. The mandate issued in Petitioner's case on May 19, 2004. On July 15, 2004, Petitioner filed in the Fifth Circuit Court of Appeals a motion to recall the mandate, and for leave to file an out-of-time petition for rehearing. As of this date, Petitioner's motion in the Fifth Circuit has not been ruled on. This petition is filed within ninety days of the judgment entered by the Fifth Circuit on April 27, 2004. SUP.CT.R. 13.1. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

On August 7, 2002, Petitioner Donald Keith Crawford, Sr., was charged in a second superseding indictment with sixteen counts of bank fraud, in violation of 18 U.S.C. §§ 2 and 1344, and with three counts of making a false statement on a loan application, in violation of 18 U.S.C. §§ 2 and 1014. Petitioner pleaded not guilty to the charges, and his trial commenced on August 12, 2002, before the Honorable Edward C. Prado, then a United States District Judge for the Western District of Texas.[1] Petitioner's trial concluded on August 16, 2002, when the jury found him not guilty of Counts 1-4, 6, and 19; and guilty of Counts 5, and 7-18. A Presentence Report was prepared and, on January 16, 2003, Petitioner was sentenced to a term of 41 months' confinement in the custody of the Bureau of

[1] Judge Prado has since been appointed to the Fifth Circuit Court of Appeals.

Prisons on each convicted count, all sentences to run concurrently, followed by a five-year term of supervised release. APPENDIX at App. 7-9. Petitioner was not fined, but was ordered to pay $377,614.18 in restitution, and $1300 in mandatory assessments under 18 U.S.C. § 3013, in aid of crime victims. APPENDIX at App. 6, 12.

On January 27, 2003, Petitioner filed a timely notice of appeal from both his convictions and sentence, duly perfecting his appeal to the Fifth Circuit Court of Appeals. Petitioner raised five issues on appeal, including two issues challenging the determination of his sentence under the federal sentencing guidelines. Oral argument was granted in Petitioner's case.

On April 27, 2004, a panel of the Fifth Circuit Court of Appeals, consisting of Judges Jolly, Jones, and Barksdale, affirmed Petitioner's convictions and sentence, except for the trial court's determination of the restitution amount. APPENDIX at App. 1-2. Petitioner's matter was remanded to the district court for entry of an amended judgment to correct the restitution ordered. APPENDIX at App. 1-2. The judgment of the Fifth Circuit issued as mandate on May 19, 2004. APPENDIX at App. 3-4.

On July 15, 2004, Petitioner filed in the Fifth Circuit Court of Appeals a motion to recall the mandate under 5TH CIR.R. 41.2, requesting leave to file an out-of-time Petition For Rehearing in light of this Court's decision in *Blakely v. Washington*, No. 02-1632, 2004 WL 1402697 (U.S. June 24, 2004). Petitioner's motion remains pending in the Fifth Circuit; his time for filing a Petition for Writ of Certiorari to this Honorable Court remains unchanged.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals, in *United States v. Pineiro*, No. 03-30437 (5th Cir. July 12, 2004), declined to apply this Court's recent decision in *Blakely v. Washington*, *supra*, to issues arising under the federal sentencing guidelines. Review should be granted because the Fifth Circuit Court of Appeals has decided an important issue of federal law which has not been, but which should be, settled by this Court. SUP.CT.R. 10(c).

Review should also be granted because the Fifth Circuit Court of Appeals' decision in *Pineiro* conflicts with the Seventh Circuit Court of Appeals' decision in *United States v. Booker*, No. 03-4225 (7th Cir. July 9, 2004) (Easterbrook, J., dissenting), which held that *Blakely* does apply to federal sentencing guideline issues. The Fifth Circuit's construction of the reach of *Blakely* in *Pineiro* conflicts with the Seventh Circuit's construction in *Booker*. SUP.CT.R. 10(a).

ARGUMENT

Whether Petitioner's Sentence Of 41 Months Is Unconstitutional Under *Blakely v. Washington*, As It Was Based Upon Facts Neither Charged In The Indictment, Nor Found By A Jury Beyond A Reasonable Doubt.

A. Determination Of Petitioner's Sentence In The Trial Court.

Petitioner's convictions arose from a floor plan financing loan made by Security National Bank to Petitioner, his son, and to their business Boerne Trailer Manufacturing, Inc. The floor plan loan was set up as a revolving line of

credit, and monies were advanced under the line of credit to manufacture trailer units. Once a trailer was sold, the bank was to be repaid from the sale proceeds. Monies as to some of the trailer units were not repaid to the bank under the terms of the loan agreement, which resulted in Petitioner's conviction of some – but not all – of the bank fraud counts.

At Petitioner's sentencing hearing, the trial court determined that Security National Bank suffered an actual loss on the floor plan financing loan of $306,738.01, reduced by $20,000 which Petitioner had paid to the bank as part of a civil settlement. This resulted in a total actual loss to the bank of $288,738, and under U.S.S.G. § 2F1.1(a) and (b)(1)(I), an offense level of Level 14.[2] The trial judge enhanced Petitioner's base offense level of Level 14 by eight additional levels based upon facts he found under a preponderance of the evidence standard. The enhancements to Petitioner's sentence, based upon facts found solely by the trial court, were as follows:

1) Loss.

Based upon the allegations in the indictment as to which Petitioner was found guilty by the jury, and as the trial court found, Security National Bank suffered an actual loss of $288,738.01 on the floor plan loan. To this sum, the trial court found as "relevant conduct" under U.S.S.G. § 1B1.3, and by a preponderance of the evidence, that Security National Bank suffered an additional loss of

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[2] Under § 2F1.1(b)(1)(I), applicable at the time of Petitioner's offense, the base offense level of Level 6 was raised 8 levels where the loss was greater than $200,000, but less than $350,000.

$70,903.17 on a companion real estate loan; and that Norwest Bank in Casper, Wyoming, suffered an intended loss of $278,871 on an unrelated – and uncharged – loan it had made to Petitioner on a separate business he had there. With the "relevant conduct" additions, the trial court found a total loss of $638,513 for sentencing purposes – or nearly $350,000 in loss beyond that arising from the allegations in the indictment, and found by the jury beyond a reasonable doubt. Petitioner objected to the addition of the "relevant conduct" amounts in timely-filed objections to the Presentence Report, in a sentencing memorandum, and at sentencing, but not on constitutional grounds.

The relevant conduct additions raised Petitioner's base offense level from a Level 14, to a Level 16, under U.S.S.G. § 2F1.1(b)(1)(K).

2) Leader/Organizer Enhancement.

The trial court raised Petitioner's offense level by an additional four levels, finding by a preponderance of the evidence that he was a leader/organizer, under U.S.S.G. § 3B1.1. There were no allegations in the indictment that Petitioner had a leadership role in the offenses and, hence, Petitioner had neither an opportunity, nor a reason, to address the enhancement at trial. Petitioner objected to the role adjustment in timely-filed objections to the Presentence Report, in a sentencing memorandum, and at the sentencing hearing, but not on constitutional grounds. With this enhancement, Petitioner's base offense level was raised another four levels, to a Level 20.

3) More Than Minimal Planning.

Finally, the trial court added two levels to Petitioner's base offense level under U.S.S.G. § 2F1.1(b)(2) for "more than minimal planning." Petitioner did not object to this enhancement – either in writing, or at the sentencing hearing.

4) Total Offense Level.

Based on its finding of the foregoing facts, the trial court determined that Petitioner's total offense level was a Level 22. At a Total Offense Level of Level 22, and with a Criminal History of Category I, the trial court determined Petitioner's statutory sentencing range to be 41 to 51 months, rather than the 15 to 21 month range which would have been applicable at Level 14.

B. This Court Decided *Blakely v. Washington* After Petitioner's Case Was Decided By The Fifth Circuit, And After The Mandate Had Issued.

In *Apprendi v. New Jersey*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). On June 24, 2004 – after Petitioner's case was decided in the Fifth Circuit Court of Appeals, and the mandate had issued – this Court decided *Blakely v. Washington, supra*. In *Blakely*, this Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . not the maximum the judge may impose

after finding additional facts." No. 02-1632, 2004 WL 1402697 at *4 (emphasis in original). It would seem evident that, as a result of *Blakely*, any fact that increases the maximum available guideline sentence must either be admitted by the defendant or proved to a jury beyond a reasonable doubt. Nevertheless, this Court "expresse[d] no opinion" as to whether the reasoning in *Blakely* would apply to the federal sentencing guidelines. 2004 WL 1402697 at *6 n.9.

C. Post-*Blakely* Cases.

In the immediate aftermath of *Blakely*, the Seventh Circuit Court of Appeals, in *United States v. Booker*, No. 03-4225 (7th Cir. July 9, 2004), held that the rationale set forth in *Blakely* applied to the federal sentencing guidelines. *Slip Op.* at 4 ("It would seem to follow . . . that *Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge.").[3] The Court had this to say:

> As an original matter, then, we think that the guidelines, . . . in which they limit defendants' right to a jury and to the reasonable-doubt standard, . . . violate the Sixth Amendment as interpreted by *Blakely*.

Id. at 7. The majority reversed the defendant's sentence – which had been based upon the trial court's determination

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[3] The panel explained that the issue in *Blakely* was not a sentencing judge's discretion, *cf.*, *Mistretta v. United States*, 488 U.S. 361, 395 (1989), but "the authority of the sentencing judge to find the facts which determine how that discretion shall be implemented, and to do so on the basis of only the civil burden of proof." *Slip Op.* at 5.

of the amount of cocaine base the defendant possessed, and the defendant's obstruction of justice – under the preponderance of the evidence standard, and remanded the case to the district court for further proceedings.[4] *Id.* at 7, 10-1.

Three days later, on July 12, 2004, a panel of the Fifth Circuit Court of Appeals, in *United States v. Pineiro*, No. 03-30437, concluded that it was bound by prior precedent to uphold the constitutionality of the guidelines following *Blakely*. *Slip Op.* at 20. In so doing, the Court acknowledged the "potential transience" of its decision, and expressed hope for a more definitive answer from this Court to "resolve the current state of flux and uncertainty." *Id.*

D. The Standard Of Review.

Blakely was decided after Petitioner's case was decided by the Fifth Circuit Court of Appeals, and after the mandate issued. Because Petitioner did not raise his constitutional claims in the district court, or in his original briefing in the Fifth Circuit Court of Appeals, his constitutional claim in regard to his sentence is reviewed for plain error. To show plain error, Petitioner must show that the

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[4] District courts in *United States v. Croxford*, No. 2:02-CR-00302PGC (D. Utah, July 7, 2004), *United States v. Medas*, No. 03-CR-1048 (E.D.N.Y., July 1, 2004); and *United States v. Shamblin*, 2004 WL 1468561 (S.D.W.Va., June 30, 2004), have reached similar conclusions.

On July 12, 2004, the Second Circuit Court of Appeals asked this Court to answer three certified questions concerning the effect of *Blakely* on the federal sentencing guidelines generally, and as the decision may apply in the context of both a jury trial and a case resolved through a guilty plea. *United States v. Peneranda*, No. 03-1055 (2d Cir. July 12, 2004) (en banc).

error was clear, and that it affected both his substantial rights and the integrity or reputation of the proceeding. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997); *United States v. Olano*, 507 U.S. 725 (1993).

E. The Trial Court's Determination Of Petitioner's Sentence – In Excess Of The Statutory Maximum Based On The Conduct Charged In The Indictment, And Found By The Jury Beyond A Reasonable Doubt – Constitutes Plain Error.

Based on the allegations set forth in the indictment, and found by the jury beyond a reasonable doubt, Petitioner's statutory sentencing range under U.S.S.G. § 2F1.1(b)(1)(I) was 15 to 21 months – not the 41 to 51 months found by the trial court – where, as here, the loss to Security National Bank on the bank fraud allegations was $288,738. In light of *Blakely*, we contend that the enhancements to Petitioner's sentence found by the trial court under a preponderance of the evidence standard unconstitutionally deprived Petitioner of his right under the Sixth Amendment to a sentence based upon facts charged in the indictment, and found by the jury beyond a reasonable doubt.

We suggest that the constitutional errors in computing Petitioner's sentence are plain, as his case is still in the line of direct appeal. *See Johnson*, 520 U.S. at 467-68 (it is sufficient that error is plain at the time of appellate consideration). We also suggest that these errors affected Petitioner's substantial rights for, here, the 41-month sentence imposed by the district court exceeded the statutory maximum it could impose *without* additional fact findings – by 26 months on the low end (15 months), and

by 20 months on the high end (21 months), of the applicable sentencing range.

Finally, the errors in the determination of Petitioner's sentence require correction because a failure to do so seriously affects the fairness, integrity, or public reputation of judicial proceedings. In *Blakely*, this Court stressed that the principles set out both there, and in *Apprendi*, further fairness in the criminal justice system. *See Blakely*, 2004 WL 1402697, at *8 ("Any evaluation of *Apprendi*'s 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon."). Here, as in *Blakely*, the increase in Petitioner's sentence was not based on facts admitted to or "proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Id.* This sort of speculativeness in the sentencing process degrades the fairness of the judicial proceedings.

F. In Sum.

We believe that this Court's reasoning in *Blakely* will have a profound impact upon federal guideline sentencing. At the present time, the Seventh Circuit's decision in *United States v. Booker*, *supra* – extending *Blakely* to federal guideline sentencing – conflicts with the Fifth Circuit's decision in *United States v. Pineiro*, *supra*, where the Court declined to apply *Blakely* to federal guideline sentencing issues. This Court should resolve the conflict between the Fifth and Seventh Circuits.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Honorable Court will grant certiorari to review the decision of the court of appeals in this case.

Respectfully submitted,

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Attorney for
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Petitioner

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 03-50160

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD KEITH CRAWFORD, SR.

Defendant-Appellant.

Appeal from the United States District Court
Western District of Texas
(SA-02-CR-23-1)

(Filed April 27, 2004)

Before JOLLY, JONES, and BARKSDALE, Circuit Judges

PER CURIAM:*

Donald Keith Crawford appeals from his conviction and sentence, following a jury trial, for 11 counts of bank fraud, in violation of 18 U.S.C. §§ 1344 and 2, and two counts of making false statements for the purpose of

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

influencing the action of a financial institution, in violation of 18 U.S.C. § 1014.

Crawford challenges: the sufficiency of the evidence to convict him on four of the bank fraud counts; the district court's refusal to grant a mistrial after the Government made allegedly improper statements during jury voir dire; the upward adjustment of Crawfords' sentence because he was a leader or organizer of the scheme to defraud; the calculation of the amount of loss resulting from the fraudulent scheme as it affected his sentence; and the calculation of the restitution amount owed by Crawford to Security National Bank.

There is no reversible error, except for the restitution amount. Because Crawford should be credited with the amount he paid Security National Bank in their civil settlement, the restitution amount is reduced by $18,500. Accordingly, this matter is remanded to district court for entry of an amended judgment consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED FOR ENTRY OF AMENDED JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-50160

D.C. Docket No. SA-02-CR-23-1-EP

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DONALD KEITH CRAWFORD, SR

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas, San Antonio.

Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

JUDGMENT

(Filed April 27, 2004)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

ISSUED AS MANDATE: MAY 19 2004

A true copy [LOGO]
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ [Illegible]
Deputy
New Orleans, Louisiana

UNITED STATES DISTRICT COURT
Western District of Texas
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

v.

DONALD KEITH CRAWFORD, SR.
Alias(es): Don Crawford, Sr.

Defendant.

Case Number
SA-02-CR-23-(1)-EP
USAO Number
1998R06674

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Jan. 27, 2003)

The defendant, DONALD KEITH CRAWFORD, SR., was represented by Ronald P. Guyer.

The defendant has been found not guilty on Count(s) 1 through 4, 6 and 19 of the Second Superseding indictment and is discharged as to such Count(s).

The defendant was found guilty on Count(s) 5, 7 through 18 of the Second Superseding Indictment by a jury verdict on August 16, 2002 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense Concluded	Count Number(s)
18 USC § 1344 and 18 USC § 2	Bank Fraud, Aiding and Abetting	From on or about August 1, 1997 and ending on or about October 1, 1998	5, 7 through 16 17 and 18

18 USC § 1014 and 18 USC § 2	False Statement on a Loan Application, Aiding and Abetting	From on or about August 1, 1997 and ending on or about October 1, 1998

As pronounced on January 16, 2003, the defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $1300.00. Payment of special assessment shall begin immediately. Said special assessment shall be made to the Clerk, U.S. District Court, 655 East Durango Blvd., San Antonio, TX 78233.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 27th day of January, 2003.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

Defendant's SSN: 421-52-3510
Defendant's Date of Birth: 04/18/1941
Defendant's address: 110 Park Place; Boeme, TX 78006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 months On each of Counts Five (5) and Seven (7) through (18) to run **concurrently**.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at F. C. I., Bastrop, Texas.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons when notified to report by the United States Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) years on each count to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

X The Mandatory Drug Testing condition is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall pay any fine, special assessment, costs of prosecution, or restitution that remains unpaid at the commencement of the term of supervised release on a schedule to be approved by the Court.

X The defendant shall not incur new credit charges or open additional lines of credit without approval of the Probation Officer unless the defendant is in compliance with the payment schedule.

X The defendant shall provide the Probation Officer access to any requested financial information.

X The defendant shall not be employed in a position requiring the handling of money or the disbursing of funds without prior approval of the probation officer.

X The defendant is prohibited from obtaining or having a checking account and is further prohibited from being a signatory on any checking account.

X The defendant shall pay all taxes, penalties and interest due and owed to the Internal Revenue Service.

X The defendant shall comply with all regulations of the Internal Revenue Service pertaining to the payment of future federal tax obligations during the period of supervised release.

X The defendant shall provide the probation officer any requested financial information including personal and business tax returns, bank and investment statements, cancelled checks, telephone bills, internet service provider agreements and billing records, safe deposit box content lists and pay stubs or paychecks.

X The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the Probation Officer, and if deemed necessary by the Probation Officer, the defendant shall participate in a program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the Probation Officer, based on the defendant's ability to pay.

X The defendant shall submit to a drug test whenever ordered by the Probation Officer.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, states, or local crime.

2) The defendant shall not illegally possess a controlled substance.

3) If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that the

defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any schedule of payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.

4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

5) If convicted of a felony, the defendant shall not posses a firearm, destructive device or any other dangerous weapon.

6) For offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation Officer.

The above drug testing condition may be suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Standard Conditions:

1) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the Court.

13) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The fine is waived because of the defendant's inability to pay.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall pay restitution in the amount of $377,641.18 to the payee(s) except that no further payment shall be required after the sum of the amounts actually paid, jointly and severally with co-defendant, Donald Keith Crawford, Jr., has fully covered all the compensable injuries.

Restitution shall be paid immediately through the Clerk, Untied States District Court for transfer to the payee(s).

Any payment shall be divided proportionately among the payees named.

Name of Payee	Amount of Restitution
South Trust Bank P.O. Box 28270 San Antonio, Texas 78228 Attention: CEO-Ref. Boeme Trailer Manufacturing, Inc.	$377,614.18

The defendant shall pay interest on restitution of more than $2,500.00, unless the restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AUG 1 0 2004

No. 04-121

In the Supreme Court of the United States

DONALD KEITH CRAWFORD, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
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(202) 514-2217

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

AUGUST 2004

* The government waives any further response to the petition unless this Court requests otherwise.